

or to modify an existing station of the qualifying entity to include the new/additional market area being partitioned. We seek comment on our proposed licensing rules.

61. Any requests for a partitioned license or disaggregated spectrum would contain the FCC Forms 490, 430, and 600 and be filed as one package under cover of the FCC Form 490. Parties are invited to comment on whether any additional procedures should be required.⁸⁸ A broadband PCS disaggregatee must file FCC Form 430 qualifying it as a common carrier unless a current FCC Form 430 is already on file with the Commission. An FCC Form 600 should be filed by the disaggregatee to receive authorization to operate in the market area which is covered by the disaggregated spectrum or to modify an existing station of the disaggregatee to include the new/additional spectrum being disaggregated. Any requests for a partitioned license or disaggregated spectrum should contain the FCC Forms 490, 430, and 600 as stated and be filed as one package under cover of the FCC Form 490. Parties are invited to comment whether any additional procedures should be required.

C. Technical and Microwave Relocation Rules

62. In the *Broadband PCS Second Report and Order*, the Commission adopted minimal technical standards to allow PCS to develop in the most rapid, economically feasible and diverse manner.⁸⁹ Specific technical standards were prescribed to the extent necessary to avoid harmful interference.⁹⁰ We also encouraged industry groups to consider ways of ensuring that PCS users, service providers, and equipment manufacturers could incorporate roaming, interoperability and other important features in the most efficient and least costly manner.⁹¹

63. We tentatively conclude that our current technical rules with respect to service area boundary limits and protections, which provide for coordination and negotiation among licensees, should be maintained and applied to partitioned license areas, which, as discussed above, would divide along geopolitical boundaries. We seek comment on this tentative conclusion. We seek comment on whether any modifications to our technical rules are needed to accommodate our partitioning and disaggregation proposals. Specifically, we seek comment on what changes, if any, are needed in our interference and other operational rules?

⁸⁸ See *id.*

⁸⁹ Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7755-78, ¶¶ 135-186 (1993) (*Broadband PCS Second Report and Order*).

⁹⁰ *Broadband PCS Second Report and Order*, 8 FCC Rcd at 7755-78, ¶¶ 135-186.

⁹¹ *Id.* at 7756, ¶ 138.

64. We recently adopted a plan for the sharing of costs for relocating fixed microwave facilities operating in the 2 GHz band allocated to broadband PCS.⁹² Under this plan, later entrant PCS licensees will be required to pay reimbursement obligations when they have benefitted from the spectrum-clearing efforts of another party, according to a cost-sharing formula that takes into account the amounts paid to relocate a particular microwave link and the number of PCS licensees that would have interfered with the link.⁹³ We tentatively conclude that a new entrant PCS licensee who gains its license through partitioning or disaggregation should be treated as any other subsequent PCS licensee for purposes of the relocation cost-sharing plan, including eligibility for installment plan payments if the transferee would be eligible for an installment plan equivalent to that enjoyed by the transferring licensee,⁹⁴ unless the reimbursement obligations to which they would be subject have already been paid by the transferring licensee. We seek comment on this approach.

D. Clearinghouse for Spectrum

65. From time to time, the Commission receives requests for limited or discrete amounts of spectrum, sometimes for small geographic areas. We seek comment on whether establishing an electronic database to make more readily accessible the information in the Commission's possession about licensed PCS spectrum would lower market entry barriers, consistent with the mandate of Section 257 of the Telecommunications Act of 1996, or otherwise be in the public interest. We request comment on how we can encourage the creation of private information clearinghouses on available spectrum, and what procedures could be utilized to assist small businesses in obtaining available licenses or spectrum from licensees to meet very limited or defined telecommunications needs. We also seek comment on how the Commission can promote information clearinghouses or other market solutions so that the public can be informed about spectrum availability in particular geographic areas or excess or available spectrum that could be disaggregated in minimum amounts.

VI. CONCLUSION

66. We believe that our partitioning and disaggregation proposals are consistent with a pro-competitive deregulatory national policy framework and will promote the rapid creation of a competitive market to deliver broadband PCS services to the largest number of consumers.

⁹² Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, FCC 96-196, *First Report and Order and Further Notice of Proposed Rulemaking*, __ FCC Rcd __, (released Apr. 30, 1996) (summarized in 61 Fed. Reg. 24470 (May 15, 1996)).

⁹³ *Id.* at ¶¶ 71-77 and Appendix A.

⁹⁴ *See id.* at A-22 - A-23 (¶ 43).

These proposals are designed to meet the Congressional objectives of opening telecommunications markets to competition, providing advanced technologies and services efficiently and quickly, and identifying and eliminating market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services.

VII. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

67. With respect to this *Notice of Proposed Rulemaking*, an Initial Regulatory Flexibility Analysis is contained in Appendix A. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis of the expected impact on small entities of the proposals suggested in this document. Written public comments are requested on the Initial Regulatory Flexibility Analysis. In order to fulfill the mandate of the Contract with America Advancement Act of 1996 regarding the Final Regulatory Flexibility Analysis we ask a number of questions in our Initial Regulatory Flexibility Analysis regarding the prevalence of small businesses in the broadband PCS industry. Comments on the Initial Regulatory Flexibility Analysis must be filed in accordance with the same filing deadlines as comments on the *Notice of Proposed Rulemaking*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rulemaking*, including the initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

B. Ex Parte Rules--Non-Restricted Proceeding

68. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1201, 1.1203, and 1.1206(a).

C. Comment Dates

69. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before 21 days after date of publication in the Federal Register, and reply comments on or before 36 days after date of publication in the Federal Register. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the

Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

70. Written comments by the public on the proposed and/or modified information collections are due 21 days after date of publication in the Federal Register. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and /or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington D.C. 20554, or via the Internet to dconway@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington D.C. 20503 or via the Internet to fain_t@al.eop.gov.

D. Initial Paperwork Reduction Act of 1995 Analysis

71. This *Notice of Proposed Rulemaking* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Notice of Proposed Rulemaking*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Notice of Proposed Rulemaking*; OMB comments are due 60 days after the date of publication of this *Notice of Proposed Rulemaking* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

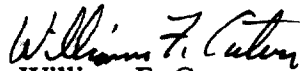
E. Ordering Clause

72. Authority for issuance of this *Notice of Proposed Rulemaking* is contained in Sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(r), and 309(j).

F. Further Information

73. For further information concerning this proceeding, contact David Nall or Mika Savir at (202) 418-0620 (Commercial Wireless Division, Wireless Telecommunications Bureau).

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS
Regulatory Flexibility Act

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this *Notice of Proposed Rulemaking*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice of Proposed Rulemaking* provided above in section VII(C).

Reason for Action: This rulemaking proceeding was initiated to secure comment on proposals to modify our broadband PCS rules to permit partitioning and disaggregation for all Part 24 licensees. The proposals advanced in the *Notice of Proposed Rulemaking* are also designed to implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. § 309(j)(4)(D).

Objectives: The Commission proposes changes to its rules for broadband PCS that are intended to facilitate the efficient use of broadband PCS spectrum, increase competition, and expedite the provision of broadband PCS service to areas that may not otherwise receive broadband PCS or other wireless services in the near term. These proposals seek to increase the level of small business participation in the provision of broadband PCS. The Commission proposes to allow broadband PCS licensees in the non-entrepreneurs' blocks to partition any portion of their geographic license area to entities that are eligible to be broadband PCS licensees. The Commission further proposes to allow entrepreneurs' block licensees to partition any portion of their licensed geographic area to entities that qualify as entrepreneurs and are otherwise eligible to be broadband PCS licensees. Additionally, the Commission proposes to eliminate the January 1, 2000 benchmark for disaggregation, and allow disaggregation any time after the broadband PCS licensee meets the five-year build-out requirement. Specifically, the Commission proposes to allow broadband PCS licensees in the non-entrepreneurs' blocks to disaggregate spectrum to entities that are eligible to be broadband PCS licensees. The Commission proposes to allow entrepreneurs' block licensees to disaggregate to another entrepreneur, otherwise qualified to be a broadband PCS licensee. Additionally, the Commission proposes to establish license terms that permit partitionees to hold partitioned licenses and disaggregatees to hold disaggregated spectrum for the remaining duration of the original ten-year license term. The Commission also proposes to establish construction requirements to ensure expedient access to broadband PCS service in partitioned areas to ensure coverage and increase spectrum efficiency. Finally, the Commission proposes to allow licensees to combine partitioning and disaggregation under limited circumstances

Legal Basis: The proposed action is authorized under Sections 4(i), 257, 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(r) and 309(j), as amended.

Reporting, Recordkeeping, and Other Compliance Requirements: The proposals under consideration in this *Notice of Proposed Rulemaking* include the possibility of imposing reporting and recordkeeping requirements for small businesses seeking licenses through the proposed partitioning and disaggregation rules. The information requirements would be used to determine if the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Forms 490 (or 430 and/or 600 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. We estimate that the average burden on the applicant is three hours for the information necessary to complete these forms. We estimate that 75 percent of the respondents (which may include small businesses) will contract out the burden of responding. We estimate that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information. Applicants (including small businesses) filing the package under cover of FCC Form 490 electronically will incur a \$2.30 per minute on-line charge. On-line time would amount to no more than 30 minutes. We estimate that 75 percent of the applicants may file electronically. We estimate that applicants contracting out the information would use an attorney or engineer (average of \$200 per hour) to prepare the information.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules:

None.

Description, Potential Impact, and Number of Small Entities Involved: The rule changes proposed in this proceeding will affect all small businesses which avail themselves of these rule changes, including small businesses currently holding broadband PCS licenses who choose to partition and/or disaggregate, and small businesses who may acquire licenses through partitioning and/or disaggregation. The Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total broadband PCS entities, existing and potential, would be affected by the proposed rules in the *Notice of Proposed Rulemaking*. In particular, we seek estimates of how many broadband PCS entities, existing and potential, will be considered small businesses. "Small business" is defined as a firm that has revenues of less than \$40 million in each of the last three calendar years. This definition was used in the PCS C-Block auction and approved by the Small

Business Administration.⁹⁵ We seek comment as to whether this definition is appropriate in this context. Additionally, we request each commenter to identify whether it is a small business under this definition. If the commenter is a subsidiary of another entity, this information should be provided for both the subsidiary and the parent corporation or entity.

The broadband PCS spectrum is divided into six frequency blocks designated A through F. The Commission has auctioned broadband PCS licenses in blocks A, B, and C. We do not have sufficient information to determine whether any small businesses within the SBA-approved definition bid successfully for licenses A or B block auctions. There were 89 winning bidders that qualified as small businesses in the C block PCS auctions. Based on this information, we conclude that the number of broadband PCS licensees affected by the rules proposed in this *Notice of Proposed Rulemaking* includes the 89 winning bidders that qualified as small entities in the block C broadband PCS auction.

We estimate up to 10,370 PCS licensees or potential licensees could take the opportunity to partition and/or disaggregate a license or obtain a license through partitioning and/or disaggregation. This estimate is based on the total number broadband PCS licenses auctioned and subject to auction, 2,074, and our estimate that each license would probably not be partitioned and/or disaggregated to more than five parties. We note that the A and B blocks each consist of 51 MTA licenses (a total of 102 licenses) and the C, D, E, and F blocks each consist of 493 BTA licenses (a total of 1,972 licenses).⁹⁶ Currently the C and F block licensees and potential licensees (holding a total of 986 licenses) must be small businesses or entrepreneurs with average gross revenues over the past three years of less than \$125 million. Under the proposed rules they will be permitted to partition and/or disaggregate to other qualified entrepreneurs. The A, B, D, and E block licensees and potential licensees (holding a total of 1,088 licenses) will also be permitted under the proposed rules to partition and/or disaggregate to small businesses.

At present, there have been no auctions held for the D, E, and F blocks of broadband PCS spectrum. The Commission anticipates a total of 1,479 licenses will be awarded in the D, E, and F block PCS auctions, which are scheduled to begin on August 26, 1996. Eligibility for the F block licenses is limited to entrepreneurs with average gross revenues of less than \$125 million. However, there is no basis upon which to estimate the number of licenses that will be awarded

⁹⁵ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5608, ¶ 175 (1994).

⁹⁶ Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs and 487 BTAs. See Rand McNally, Inc., *Commercial Atlas & Marketing Guide*, 123rd Edition, pp. 38-39 (1992). For PCS licensing purposes the Commission separated Alaska from the Seattle MTA and added five insular areas: Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands, and American Samoa. See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4969, ¶ 24 (1994).

to small businesses, nor is there a basis for an estimate as to how many small businesses will win D or E block licenses. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees, and that no reliable estimate of the number of D, E, and F block licensees can be made, we assume, for purposes of this IRFA that all of the licenses will be awarded to small businesses. We believe that it is possible that a significant number of the up to 10,370 PCS licensees or potential licensees who could take the opportunity to partition and/or disaggregate a license or who could obtain a license through partitioning and/or disaggregation will be small businesses.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives: The proposals advanced in the *Notice of Proposed Rulemaking* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services. The impact on small entities in the proposals in the *Notice of Proposed Rulemaking* is the opportunity to enter the Broadband PCS market through the partitioning and disaggregation proposals herein.

The rule changes proposed in the *Notice of Proposed Rulemaking* by the Commission are consistent with the Communication Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services, and the mandate under Section 309(j) of the Communications Act of 1934, as amended, to utilize auctions to ensure that small, minority and women-owned businesses and rural telephone companies have an opportunity to participate in the provision of spectrum-based services. The Commission's proposals in this *Notice of Proposed Rulemaking*, if implemented, will facilitate market entry by parties who may lack the financial resources for participation in PCS auctions, including small businesses. These proposals, if implemented, will promote technological advancement and participation by diverse entities, as well as facilitate the efficient use of broadband PCS spectrum. The alternative to the Commission's proposal to allow geographic partitioning would be to maintain the status quo and only permit rural telephone companies to utilize partitioning through forming an auction bidding consortium comprised entirely of rural telephone companies or through private negotiation post-auction. Limiting geographic partitioning to rural telephone companies would not permit other small businesses to obtain partitioned licenses or to partition to other parties, and thus would not promote the participation of small businesses in the provision of PCS. The Commission also noted that the proposed partitioning policy would allow spectrum to be used more efficiently, speed service to underserved areas, and increase competition.

In this *Notice of Proposed Rulemaking*, the Commission observed that initially general partitioning by broadband PCS licensees was not permitted because of the concern that licensees might use partitioning as a means to circumvent construction requirements. The Commission tentatively concludes that both the partitioner and partitionee should be subject to coverage requirements that ensure that both portions of a partitioned licensing area will receive service.

The Commission proposes facilitating partitioning by offering a choice between two different build-out options, which could be negotiated between the partitioner and partitionee. The first option proposed by the Commission would require a partitionee to satisfy the same construction requirements as the original licensee within its partitioned area, regardless of when it acquired the partitioned license. This approach is consistent with the present construction requirements for rural telephone companies.⁹⁷ The second option proposed by the Commission would apply where the original licensee has met its five-year build-out requirements and certifies that it will meet the ten-year coverage requirements for its entire license area. Specifically, the Commission proposes that partitionees must only satisfy the substantial service requirement for renewal expectancy for its partitioned area by the end of the original ten-year license term. The Commission tentatively concludes that these proposed flexible build-out requirements, if adopted, will encourage partitioning to entities that have a sincere interest in providing broadband PCS and will thereby expedite the provision of service to areas that otherwise may not receive it as quickly.

The Commission considered the fact that many broadband PCS licensees may meet their five-year build-out construction obligation early, and therefore proposes revisiting the current prohibition on disaggregation. The Commission considered the alternative, requiring PCS licensees to wait until January 1, 2000 before disaggregating, and noted that this would not permit small businesses to disaggregate or obtain disaggregated spectrum and therefore, would not promote an efficient use of spectrum.

The Commission is proposing to allow partitioning and/or disaggregation by entrepreneurs only to other qualified entrepreneurs for five years, to ensure the objective that entrepreneurs and small businesses continue to participate as PCS licensees for substantial periods of time, and through that participation obtain experience and profits that will enable their long term participation in communications industries. The Commission is proposing to apply proportional unjust enrichment provisions for partitioning and disaggregation by entrepreneurs to non-entrepreneurs after the five-year period. The alternative to this proposal, would be to either prohibit partitioning by entrepreneurs or to allow entrepreneurs who have benefitted from special bidding provisions to become unjustly enriched by immediately partitioning a portion of their license area to parties that do not qualify for such benefits. The Commission also noted that allowing partitioning and/or disaggregation by entrepreneurs only to other qualified entrepreneurs for five years is consistent with the Commission's rule allowing license transfers by entrepreneurs only to other entrepreneurs in the first five years of the license period.⁹⁸

⁹⁷ 47 C.F.R. § 24.714(e).

⁹⁸ 47 C.F.R. § 24.839(d).

The Commission believes that allowing entrepreneurs and small businesses to partition and/or disaggregate their licenses to other qualified entrepreneurs and small businesses, and allowing all non-entrepreneurs to partition and/or disaggregate to any qualified party (including small businesses) will help attain the Congressional objective of ensuring that small businesses have an opportunity to participate in the provision of broadband PCS. These proposals will enable a wide variety of applicants, including small businesses, to overcome entry barriers in the provision and ownership of telecommunications services.

This *Notice of Proposed Rulemaking* solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered.

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees

I support the substance of this item but want to interject a cautionary note.

Our proposal to permit disaggregation and partitioning of the personal communications services band is sound. Most importantly, it would enable more small businesses to "get a piece of the action" by operating within a limited geographic area or on a slice of spectrum.

Many smaller players often lack the resources to provide service to areas as large as the Major Trading Areas and Basic Trading Areas that were the geographic building blocks in our auctions. Some of those who successfully bid on MTA and BTA licenses may not need 100 percent of their licensed spectrum blocks to provide their intended services. The changes proposed in this Notice may permit these two situations to be reconciled, thereby enabling more entrepreneurs to participate in providing services and facilitating more and better services to be delivered to rural and other less-populated geographic areas.

I support these proposed changes to our rules. Nevertheless, I want to signal a note of caution about the frequency of rule changes.

Earlier today we adopted changes to our rules that permit PCS and other commercial mobile radio service providers to provide any and all fixed services in addition to mobile services, consistent with our technical regulations. As with our disaggregation and partitioning proposals, these are revisions which I support.

But, taken together, the changes proposed herein, the PCS service revisions adopted today, and the other service and auction rule changes we have adopted over the past several months constitute a substantial modification of our rules in mid-stream -- after some but not all of the licenses have been auctioned, and before the licensees have had a chance to implement the business plans pursuant to which they bid for their licenses.

Flexibility and new ideas are always welcome, but constancy is also a virtue. Regulatory uncertainty has the potential to undermine our services and our auctions by generating confusion on the part of service providers and the financial community.

We can always improve upon our rules. But I hope that we do not get in the habit of

repeatedly rewriting the rules before the ink is dry and they have had a chance to be applied in the marketplace. In my view, absent a compelling need, our rules should remain in place at least through initial construction periods.

We are approaching the point where marketplace behavior may begin to reflect the assumptions that our rules will continue to evolve every few months and that therefore there is no need to comply with those that have already been promulgated. That would be grossly unfair to those who diligently follow the rules as written. We are already too close to that point now, and I trust that we will not go beyond it.